BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

FEDERAL SUPERVISION OF INSURANCE. — A new subject for the application of the power of Congress to regulate interstate commerce is suggested by the recommendation of a federal statute regulating insurance, which was made by a special committee at the last meeting of the American Bar Association. *Report of the Committee on Insurance Law.*[1] Four of the committee's five members joined in the majority opinion, while the fifth presented a minority report. Neither report was acted upon by the association, but a resolution declaring the opinion that federal control of insurance would be unconstitutional was referred to the Committee on Insurance Law for the present year.

The members of the committee, while unanimous in the opinion that Congressional regulation is desirable and practicable, disagree upon the question of its constitutionality. The majority report maintains that the past decisions of the United States Supreme Court do not exclude the business of insurance from the definition of "commerce," and intimates that Congress itself has the exclusive power to determine what articles are the subjects of interstate commerce within the meaning of the constitutional provision. The minority opinion denies both these propositions, and insists that federal supervision is impossible without a constitutional amendment.

The statement that Congress has authority to define the limits of its power to regulate interstate commerce, which is at least startling, suggests an examination of the authorities upon which it purports to be based. The majority rely upon isolated sentences quoted from decisions which denied to a state the power to exclude from its boundaries intoxicating liquors in the original packages. The language of these cases is clearly shown by the context to mean that Congress, as against the asserted police power of a state, has authority to determine whether commodities which are admittedly in fact subjects of commerce within the meaning of the constitutional clause, shall be lawful articles of commerce. Further support for the committee's position is sought in the famous case of McCulloch *v.* Maryland (4 Wheat. [U. S.] 316). This decision, however, was simply to the effect that Congress has the implied power to charter a national bank as an appropriate means to the execution of its admitted fiscal powers; and the opinion contains no intimation that Congress has authority to define the limits of the great substantive and independent powers, to which the power of choosing appropriate means of execution was held to be annexed as an incident. The authorities cited do not deny that the meaning of the term "commerce" in the constitutional phrase is a question of the interpretation of a written instrument which is to be made by judicial decision, and not by legislative *fiat*.

The majority's contention, that past decisions furnish no obstacle to federal regulation of insurance, is true only to the extent that the Supreme Court has never passed upon the validity of an act of Congress regulating insurance. It has, however, frequently held constitutional state statutes which totally exclude foreign insurance companies from doing business within state territory except upon condition that they obtain a license from the state or pay a tax upon the amount of premiums secured in the state. *Paul* v. *Virginia*, 8 Wall. (U. S.) 168, 183; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. (U. S.) 566, 573. The contention that these decisions have not excluded insurance from the definition of "commerce" cannot be supported except upon the assumption that the statutes affected only matters local and limited in their nature, which state legislatures may regulate in the absence of legislation by Congress. But the

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opinions, so far from being rested upon this narrow ground, have specifically stated that insurance is not "commerce" within the meaning of the constitutional provision. Furthermore, if insurance were "commerce," state statutes exacting a tax or license from foreign insurance companies as conditions precedent to their doing business within the state, could not be sustained consistently with the line of decisions which hold invalid identical statutes concerning express companies and railroads. *Cf. Crutcher* v. *Kentucky*, 141 U. S. 47; *Hooper* v. *California*, 155 U. S. 648, 653; *Nutting* v. *Massachusetts*, 183 U. S. 553, 556. In each class of cases the state is not legislating concerning merely local subjects, but is interfering directly with the freedom of interstate business; in each the interference is sought to be justified by the right to exercise police powers. The only valid distinction between the two classes of statutes is that one does, and the other does not, attempt to regulate "commerce." The recent decision concerning lottery tickets, which is cited in the majority report holds, not that lottery companies are engaged in "commerce," but that the carrying of lottery tickets by an express company is commerce. *Lottery Case*, 188 U. S. 321, 354. This opinion, from which four justices dissented, can hardly be said to have weakened the authority of the earlier cases recognizing the power of a state to regulate insurance. A reversal of these decisions could be justified only upon the ground that a radical change in the nature of the business of insurance has occurred since they were rendered; and on principle it seems difficult to distinguish the present business of insurance from that of the negotiation of any contract by mail between parties residing in different states.

DISHONOR OF A CERTIFIED CHECK. — It is common belief that a bank is under an absolute obligation to pay a check certified at the instance of the payee as long as the check remains in his possession, and that the payee, questions of forgery aside, has an irrevocable right to compel payment, irrespective of the circumstances under which he procured the check. MORSE, BANKS AND BANKING, 4th ed., § 414. While admitting this as a general principle, a late article by an anonymous writer suggests that the bank, under certain circumstances, is justified in refusing to honor the check. *Stopping Payment of a Certified Check*, 22 Bank. L. J. 411 (June, 1905). It is, of course, assumed that the check has not reached the hands of a *bona fide* purchaser for value. The author points out that a certified check is analogous to a promissory note of the bank, and that a bank does right in refusing to pay its bank note held by a thief. *Olmstead* v. *Bank*, 32 Conn. 278. Therefore, under like conditions, it should also be protected in its refusal to pay a certified check; and it is contended that the same power should exist when the bank has notice that the check was obtained by the payee through fraud on the maker, or as payment for an illegal transaction, such as gambling, in which both maker and payee were concerned.

Though the writer does not support his view by any theoretical discussion, his result appears to be substantially correct. On certification the practice is for the bank to debit immediately the amount of the check to the maker's account, and credit its "certified check account," which is in turn debited with the check on payment. The drawer being thus effectually deprived of all control over that amount of his earlier credit, a novation arises, by which the bank promises the drawer to pay the payee, in consideration of the drawer's giving up all claim on it. As the act of certification is merely a short cut for actual payment by the bank of the amount of the check, and its redeposit by the payee, the payee, as consideration for the bank's promise, accepts the extinction of the check and allows the money to remain on deposit. Finally, the novation is completed by the payee's promise to accept the bank as debtor in the drawer's place, for which the latter promises to release his claim against the bank. A certified check is, then, like a bank note — the maker is released, and the bank is bound directly to the payee.